***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

ORIGINAL

To be argued by
ROBERT S. PERSKY

74-2197 B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

C.A. Docket No. 74-2197

UNITED STATES OF AMERICA,

Appellee,

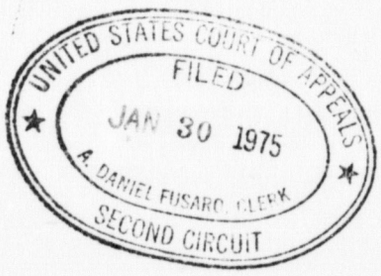
-v-

ZELIG SPIRN,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE
SOUTHERN DISTRICT OF NEW YORK

# BRIEF ON BEHALF OF APPELLANT

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## CASES CITED



## OTHER AUTHORITIES CITED

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Appellee, :

-against- :

ZELIG SPIRN, :

Appellant. :

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STATEMENT PURSUANT TO RULE 28 (3)

PRELIMINARY STATEMENT

This is an appeal from a judgment rendered July 26, 1974 in the United States District Court for the Southern District of New York (Tyler, J.) adjudicating Appellant Spirn after a non-jury trial of being a juvenile delinquent based on the underlying charges that he willfully struck a foreign official in violation of Title 18 U.S.C. Sec. 112(a) and 2. Appellant Spirn was sentenced to a probationary term not to exceed his minority.

## QUESTIONS PRESENTED

1. Were the restrictions imposed by the Trial Court on Defense Counsel's Cross-Examination reversible error both as an abuse of discretion and a denial of Sixth Amendment right of confrontation and assistance of counsel?

2. Was it plain error for the Judge to determine the existence of Defendant's guilt prior to the presentation of the defense?

# STATUTES

**§ 2. Principals**

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. As amended Oct. 31, 1951, c. 655, § 17b, 65 Stat. 717.

**§ 112. Protection of foreign officials and official guests**

(a) Whoever assaults, strikes, wounds, imprisons, or offers violence to a foreign official or official guest shall be fined not more than $5,000, or imprisoned not more than three years, or both. Whoever in the commission of any such act uses a deadly or dangerous weapon shall be fined not more than $10,000, or imprisoned not more than ten years, or both.

## STATEMENT OF FACTS

Appellant Spirn and his co-defendant, Rein, were charged in an indictment with willfully and knowingly striking a foreign official and official guest in violation of Title 18 U.S.C. Sec. 112(a) and 2. Both Appellant Spirn and Rein reserved their right to a jury trial by motion and chose to proceed under the Federal Juvenile Delinquency Act. The case was tried by the Hon. Harold R. Tyler.

Before any testimony was adduced, the Government informed the court that its witness, a Soviet official, agreed to a partial waiver of diplomatic immunity only as far as the facts surrounding the ircident, but that he would retain his diplomatic immunity privilege to object to any particular question (T15and16). When counsel objected to this procedure as a limitation on normal cross examination, the court stated that the position of the complaint was consonant with long-standing principles of international law and it could discern no disadvantage or prejudice that would accrue to the defense (T16 and 17).

GERMAN KOSENKOV, a secretary of second rank with the Russian representation with the United Nations, testified that his office was at 137 East 67th Street and his residence at 257 East 67th Street at the corner of Second Avenue (T27 and 28).

On March 15, 1973 at about 9:00 p.m., Mr. Kosenkov was on the west side of Third Avenue between 67th Street and

70th Street when he heard two men running behind him (T28 and 29). He turned around to observe two men breathing heavily. This observation encompassed three to four seconds (T29 and 46). He continued walking and the two boys followed approximately two to three feet behind him (T29). When he came to the intersection at 72nd Street and Third Avenue, he stopped for a light. At this point, a red liquid was thrown at him, hitting him in his face and on his raincoat (T29 and 30).** Kosenkov turned around and saw two men running down 72nd Street towards Lexington Avenue (T32). This time he was only able to observe the boys for one to three seconds (T46). When the liquid hit him, he acknowledged that he was emotionally upset and very nervous (T50). Kosenkov then identified Rein as one of the young men who had thrown the liquid but he was not sure whether Appellant Spirn was the second person (T33).

Thereafter, Kosenkov went to his mission where he washed himself and then went with the first secretary. Mr. Skotnikov, to the police precinct (T36). At the station, he was told by a police officer to go near a second room and it was then that he immediately recognized the two young men who had assaulted him (T36).

On cross-examination by Spirn's counsel, the Court sustained objections to questions such as whether the witness

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** A stipulation was entered that the FBI laboratory tests indicated that the stains on the raincoat were due to beef blood (T31 and 32).

was a Communist; whether he was a representative of the Soviet Union; whether he knew the meaning of truth; whether it is part of Communist doctrine to tell a lie and to be permitted to represent it as the truth if it is in furtherance of an end that is part of the philosophy of the Communist government; whether as a diplomat he is informed of the relationship between the United States government and the Soviet government; whether he is involved in the suppression of the rights of the Soviet Jews; whether his duties are concerned with Exit Visas to those (Jews) who desire to emigrate from the Soviet Union and reside in the State of Israel; whether it is part of the policy of the Soviet Government to destroy the Jewish State of Israel.

The court admonished counsel that such questions would not be permitted, stated that they were totally irrelevant in the context of this case, and denied counsel an opportunity to be heard on the matter (T56 and 57).

DETECTIVE DAVID GREENBERG testified that on the night in question, his partner, Detective Robert Hanz, and Susan Bell were in a taxi en route to a live radio show (T69). He observed a man falling to the ground and two males bending over him and then running away. Another person assisted the man on the ground who seemed to be covered with blood. Since a crime appeared to have been committed, Greenberg instructed the cab driver to pursue the two males. When the two men stopped in the middle of

the street to wave for a cab, they saw the detectives. They then started running in opposite directions (T70). When Greenberg hollered for them to stop, they obeyed and put their hands up (T71). According to Greenberg, the two were searched but no weapons were found (T71). The heavier of the boys finally said that the man had not been hurt or beaten and what he saw was not blood but just red paint (T71). Greenberg stated that there was a red substance on the clothing of one of the boys and he also kept insisting that it was paint and not blood (T73). When the Detective told them that he would have to know whether the fallen man had been injured, one of the boys said that the man could be found at the Russian Embassy (T73).

At the conclusion of the Government's case, Counsel argued that the police station identifications procedures was so inherently suggestive that the original identification must be deemed tainted (T109). The court ruled against Appellant Rein on the question of identification. The court's ruling is set forth in Appendix B.

In finding Appellant Rein guilty as charged, the court made specific findings of fact (T128 to 132). In the aforementioned findings of fact the Court stated that both defendants perpetrated the act in question (T131).

The following day the hearing continued and defendant's counsel produced Detective Greenberg as his own witness (T143).

The Court then adopted the background findings of fact with respect to Rein's decision and included same in his findings of guilt as to Spirn (T185to191).

## ARGUMENT

### POINT I

THE RESTRICTIONS IMPOSED BY THE TRIAL COURT ON DEFENSE COUNSEL'S CROSS-EXAMINATION WAS REVERSIBLE ERROR BOTH AS AN ABUSE OF DISCRETION AND A DENIAL OF SIXTH AMENDMENT RIGHT OF CONFRONTATION AND ASSISTANCE OF COUNSEL.

At the trial proceedings, counsel for the defendant was precluded by the court from any opportunity to cross-examine the prosecution witness as to areas that would have had an important bearing on the truthfulness of the testimony (T54-2 to T57-6). The court's action was unreasonable and amounted to an infringement of the substantial rights of the defendant F.R.C.P. 52 (b) although the witness claimed a limited immunity (T15-23 to T16-13).

In U.S. v. Jorgenson, 451 F.2d 516, 519 (10th Cir. 1972) it was stated that:

> "Clearly, the right of cross examination is fundamental in our judicial system. Indeed, we have long held '(a) full cross-examination of the witness upon subjects of his examination in chief is the absolute right, not the mere privilege, of the party against whom such witness is called, and denial is prejudicial error.' Minner v. United States, 57 F.2d 506, 512 (10th Cir.1932). The error of restrictive cross-examination arises in either or both of two contexts. The restriction may be such as to constitute a denial of the Sixth Amendment right of confrontation. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed. 2d 923 (1965). A limitation of cross-examination, though deemed not prejudicial to the accused's rights, may still be determined to be an abuse of discretion by the trial court. Harries v. United States, 350 F.2d 231 (9th Cir. 1965).

> Any reversal of the conviction on the bias of restrictive cross-examination must be based upon a showing of either or both a denial of a due process right of confrontation or an abuse of discretion by the trial court in limiting cross-examination."

The denial of the due process right to confrontation attached when counsel for defendant was foreclosed from delving into the possible existence of prosecution witness's motive to falsify testimony. The court stated that:

> "The right of confrontation extends to <u>areas</u> of cross-examination. An area which is properly subject to cross-examination cannot be denied the accused. A limitation which prevents cross-examination into an area which is properly subjuect to cross-examination does constitute reversible error. The characteristic feature in this situation is the complete denial of access to an area which is properly the subject of cross-examination; the extent of cross-examination is discretionary with the trial judge. Smith v. Illinois, 390 U.S. 129, 88 S. Ct. 748, 19 L. Ed. 2d 956 (1968). This distinction has been long recognized by this Court. In Arnold v. United States, 94 F.2d 499 (10th Cir. 1938), we stated at 506:
>
> A reasonably full cross-examination of a witness upon the subjects of his examination in chief is the right, not the mere privilege, of the party against whom he is called, and as a rule, a denial of this right is prejudicial error. It is only after the right has been substantially and fairly exercised that the allowance of cross-examination becomes discretionary." <u>Jorgenson</u>, 451 F2d at 519.

The Supreme Court has addressed itself to the important purpose of cross-examination, stating:

> "A more particular attack on the witness' credibility is effected by means of cross-

> examination directed toward revealing possible biases, prejudicial or ulterior motives of the witness as they may relate directly to issues of personalities in the case at hand. The partiality of a witness is subject to exploration on trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony'. (3A Wigmore Evidence Sect. 940, at 775 Chadbourne rev. 1970). We have recognized that the exposure of a witness's motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. Green v. McElroy, 360 U.S. 474, 79 S. Ct. 1400, 1413, 3 L. Ed2d 1377 (1959)." Davis v. Alaska, 94 S. Ct. 1105, 1110, (1974).

Although granted that cross-examination of a witness on collateral matters, to impeach credibility is disallowed, this limitation is not operative where motive to falsify testimony, is the force of that cross-examination. On this point, the Second Circuit has stated:

> "As previously stated by Judge Medina of this Court in United States v. Lester, 248 F.2d 329, 334 (2nd Cir. 1957), '(a)lthough a party may not cross-examine a witness on collateral matters in order to show that he is generally unworthyof belief and may not introduce extrinsic evidence for that purpose***a party is not so limited in showing that the witness had a motive to falsify the testimony he has given.' Thus, 'bias or interest of a witness is not a collateral issue, and***extrinsic evidence is admissible thereon.' United States v. Battaglia, 394 F.2d 304, 314 n.7 (7th Cir. 1968)." U.S. v. Haggett, Jr. 438 F2d 396, 399 (2nd Cir. 1971).

> "Ordinarily, extrinsic evidence may not be used to impeach a witness's general credibility or his specific testimony on a collateral matter. But evidence which is probative of a special motive to be or fabricate a case against a defendant is admissible because it bears directly on the issue of the defendant's guilt." U.S. v. Kinnard, 465 E2d 566, 573 (Dist. of Col. 1972)

The range of topics into which defense counsel can delve to illuminate 'motive' is endless. The Second Circuit is aware of the fact, stating to this effect:

> "...and it is permissible to show that contrary testimony would subject the witness to criticism by his superiors, Atlantic Coast Line R. Co. v. Dixon, 5 Cir. 207 F.2d 899, 904." U.S. v. Lester, 248 F.2d 329, 334 (2nd Cir. 1957).

Certainly, in the case sub judice the credibility of the government witness was highly suspect. Not only is the witness a communist, a member of an organization dedicated to totalitarian principles totally inopposite to ours, but in addition he is a diplomat in the service of a foreign communist state whose avowed aim is said to be the overthrow of the free world. The fact that he is an agent in the service of a hostile political-social-economic movement, whose guiding philosophy is 'the ends justify the means' is a matter of the utmost consideration.

In Fawick Air Flex Co., Inc. v. U.E.R.M.W.A. local 735, 92 NE2d 436 (Ct. of Appeals of Ohio 1950) the appellate court sustained defense counsel's question of whether the witness was a member of the communist party, stating:

> "Gradually the fundamental principles of the Communist Party have become matters of public knowledge. Their social and political theories are vastly different than those understood and supported by the loyal citizens of our democracy. Our fundamental beliefs are held at naught and have no binding effect in directing their social relations. It has been demonstrated times without number in recent years in trials and hearings before constituted public committees and bodies

> the fact that a member of the Communist Party is not bound by his oath under any circumstances. They feel no binding force to the sanctity of an oath. Judges and courts will not shut their minds to truths that all others can see and understand. It therefore is clearly demonstrated that the question of membership in the Communist Party is competent where there is some background for it to test the credibility of a witness." Fawick, 92 NE 2d at 445.

Although Fawick was only interested in the question of membership in the Communist party, per se, the considerations present in the instant case induce the proper questioning of the activities and goals of the Soviet Union.

In Wallace v. Delaware, 211 A2d 845 (Sup. Ct. of Del. 1965), the Court stated at 848:

> "The facts giving rise to the first question are that the defendants sought to cross-examine one of the State's witnesses in order to discredit him and impeach his testimony by examining him as to his alleged past Communist activities."

The objection to this questioning was sustained due to the fact that the defense had no proof whatsoever as to the witness's membership in the Communist Party. Of course, in the case at hand there is no such defect.

Counsel for defense was not attempting to

> "...degrade the witness upon a matter not directly pertinent and material to the issue before the court. When that appears to be the case the question is improper". Wallace, 211 A2d at 848.

For the forementioned reasons, these questions are highly pertinent. There is present a real nexus connecting the witness'position and function in the Soviet Union's Communist Party

and the avowed aims of that Party to suppress Jewry.

In Lester, supra, this court had stated that the areas of motive, interest and bias are always open for cross-examination. The Second Circuit recently reiterated this holding, stating:

> "Of course, there is no litmus test method to determine whether extrinsic evidence should be admitted to prove that a witness had a motive to testify falsely as to a particular matter, but a defendant should be afforded the opportunity to present facts which, if believed, could lead to the conclusion that a witness who has testified against him either favored the prosecution or was hostile to the defendant. United States v. Lester, supra 248 F.2d at 334. Evidence of all facts and circumstances which 'tend to show that a witness may shade his testimony for the purpose of helping to establish one side of a cause only' should be received. Majestic v. Louisville & N.R. Co. 147 F2d 621, 627 (6th Cir. 1945)." Haggett, 438 F.2d at 399.

In Haggett, supra, the court reversed the trial court's refusal to allow the defense counsel

> "...to prove that his sole motive for testifying was to see Haggett convicted, appellant unsuccessfully attempted to call three witnessess to testify on his behalf." Haggett, 438 F.2d at 398.

Another attack on motive was sustained in Grant v. U.S. 368 F.2d 658 (5th Cir. 1966). The Court reversed the conviction, stating at page 661:

> "The substance of the question went directly to Holtzclaw's credibility. It was an inquiry into motive and possible bias. It was a search for a promise or a reward on the part of the government in return for help in the prosecution of appellant...The answer to the inquiry may have availed appellant nothing but it was addressed to a relevant area of inquiry and the

witness was on cross examination."

In U.S. v. Kartman, 417 F.2d 893, 897, (9th Cir. 1969).

In recognizing that prejudice, as an inducing motive to falsify testimony, is a valid area of cross-examination, the court at page 897 stated:

> "Prejudice toward a group of which defendant is a part may be a source of partiality against the defendant. He is therefore entitled to a reasonable opportunity to cross-examine witnesses as to the existence of any such prejudice, and its possible effect upon their testimony. Jacek v. Bacote, 135 Conn. 702 68 A.2d 144, 146 (1949). Magness v. State, 67 Ark., 594, 50 S.W. 554 59 S.W. 529 (1899; see also People v. Christie, 2 Abb. Pr. 256, 259, 2 Park Cr. R. 579, 583 (N.Y.S. Ct. 1st D 1855); United States v. Lee Huen, 118 F. 442, 463 (N.D.N.Y. 1902) (dictum)."

The right to cross-examination is to be safeguarded, according to the 2nd Circuit, when the witness is one testifying on behalf of the government. In U.S. v. Fitzpatrick, 437 F.2d 19 (1970) this Circuit held:

> "The Government relies on the fact that the instant case, unlike the cases discussed above, was tried to a judge rather than a jury; and it argues that for Judge Rayfiel to continue the cross-examination once he had become convinced of the government's identification testimony would have been a waste of time. We disagree. The absence of a jury should make no difference since a defendant must be allowed a full and fair opportunity to test and explore incriminating testimony."

Not only was there a due process denial of right to confrontation, but in addition the trial court abused its discretion in limiting the cross-examination. This latter

limitation is additional ground for reversal. Jorgenson, 451 F.2d at 519, supra. It has been often stated that the trial judge's discretion does not become operative until the party has had opportunity to cross-examine in the chosen area:

> "The scope of cross-examination and the limits upon it are committed to the discretion of the trial court and will not be interfered with by an appellate court absent an abuse of discretion ....However, the full cross-examination of the witness is a right and it is only after a party has had the opportunity to exercise the right of cross-examination that the discretion becomes operative...Here the right was terminated before it could be exercised. The court should have permitted the question." Grant, 368 F.2d at 661, supra.

The Second Circuit has expressed this doctrine in the following words:

> "We agree that complete preclusion of cross-examination as to motive for testifying is an abuse of discretion; but beyond that, the issue is whether defense counsel had an opportunity to bring out considerations relevant to motive or bias. Here, counsel was not prevented from adequately establishing such a motive, and the issue was fairly put to the jury in the court's charge." U.S. v. Mahler, 363 F.2d 673 677 (2nd Cir. 1966).

Thus, what the other circuits would hold as a denial of due process, is in Mahler considered to be an abuse of discretion. However, in either case, there should be reversal and remand. In the instant case the witness did not waive his full diplomatic immunity, yet defendant's counsel was disallowed any access to cross-examine as to motive. This was a due process denial of confrontation. Since the defendant was not allowed to even penetrate this area, the court's power of discretion had not yet become

operative. Thus, his use of the discretion is by definition an abuse of it.

This denial of cross-examination was most unfortunate since no record could be developed for both use of the trial judge himself, as well as of the appellate court. In considering the problem, the Supreme Court of the United States had stated:

> "We cannot accept the Alaska Supreme Court's conclusion that the cross-examination that was permitted defense counsel was adequate to develop the issue of bias properly to the jury. While counsel was permitted to ask Green whether he was biased, counsel was unable to make a record from which to argue why Green might have been biased or otherwise lack that degree of impartiality expected of a witness at trial." Davis, 94 S. Ct. at 1111.

In addition to the complete lack of record as to testimony on the government witness's motive for testifying, there is no record of the grounds for the court's refusal to hear this testimony. In appraisal of this situation, Justice White in a concurring opinion has stated:

> "[t]he Court recognized that questions which tend merely to harass, annoy, or humiliate a witness may go beyond the bounds of proper cross-examination. I would place in the same category those inquiries which tend to endanger the personal safety of the witness. But in these situations, if the question asked is one that is normally permissible, the State or the witness should at the very least come forward with some showing of why the witness must be excused from answering the question. The trial judge can then ascertain the interest of the defendant in the answer and exercise an informed discretion in making his ruling. Here the State gave no reasons justifying the refusal to answer a quite usual and proper question. For this reason, I join the Court's judgment and its opinion which, as I understand it, is not inconsistent with these views." Smith vs. State of Illinois, 88 S. Ct. 748, 751 (1968).

It is no grounds for the refusal to allow cross-examination, for the trial court to rely on the absence of a jury, for whose use wide latitude of cross-examination is often elicited. Nor can the absence of jury serve as an excuse for the trial judge to come to a "quick conclusion" without noting what responses may result from the cross-examination. In Fitzpatrick, supra, the Second Circuit has stated:

> "Even a judge who appears to have made up his mind on the basis of what he has heard, may be moved to reasonable doubt in the light of what may develop from full cross-examination on relevant matters." Fitzpatrick, 437 F.2d at 25.
>
> "Despite fact that case was tried to a judge, rather than a jury, and despite convincing nature of government's identification testimony, defendant had to be allowed a full and fair opportunity to test and explore by cross-examination the government's incriminating identification testimony." Ibid.

For these reasons, it is respectfully requested that this court reverse the conviction and remand for a new trial.

## POINT II

IT WAS PLAIN ERROR FOR THE JUDGE TO DETERMINE THE EXISTENCE OF DEFENDANT'S GUILT PRIOR TO THE PRESENTATION OF THE DEFENSE.

Due to the request from co-defendant's counsel to terminate his section of the case (T127-20to23), the court stated that it would make special findings that affected the co-defendant Rein (T128-10to15); but in disregard of the fact that the findings were to pertain solely to the co-defendant Rein, the judge stated as a finding that:

> "I find further that it was done wilfully and knowingly by the two defendants in question; that they intended this result; that they knew what they were doing and it didn't happen by innocence or mistake." (T131-3to6)

At the time this finding was made, the trial as to the guilt of the defendant Spirn was still in progress. There was no request at that time for a finding respecting the guilt of the defendant Spirn by Spirn's counsel. The defense had not yet been presented. Later the defense did call Officer Greenberg as its witness to testify to pertinent aspects of the case (T143-8andT158-11). Who can say whether the judge's premature finding of guilt foreclosed his objective consideration of this testimony?

In commenting upon the aspect of a fixed opinion by a trial judge, the Second Circuit in United States v. Brandt, 196 F.2d 653 (1952) U.S. Court of Appeals, Second Circuit, stated on page 656:

> "Because of his proper power and influence, it is obvious that the display of a fixed opinion as to the guilt of an accused limits the possibility of an uninhibited decision

> from a jury of laymen much less initiated in trial procedure than he. He must, therefore, be on continual guard that the authority of the bench be not exploited toward a conviction he may privately think deserved or even required by the evidence. United States v. Minuee, 2 Cir., 114F.2d 36; Martucci v. Brooklyn Children's Aid Soc., 2 Cir., 140 F.2d 732; United States v. Marzano, 2 Cir. 149 F.2d 923.
>
> In the case at bar this mandate of judiciousness appears to have been breached on unfortunately more than a single occasion. Thus the examination of witnesses and discussions with counsel by the court were spotted with a number of remarks which were not of the form to elicit information or direct the trial procedure into proper channels, but rather to cut into the presumption of innocence to which defendants are entitled."

It is submitted that although the above comments were made in a jury trial, they are equally applicable to a non-jury case.

In United States v. Fitzpatrick, United States Court of Appeals, Second Circuit, 1970, the court at Page 25 stated:

> "The government relies on the fact that the instant case, unlike the cases discussed above, was tried to a judge, rather than a jury; and it argues that for Judge Rayfiel to continue the cross-examination once he had become convinced of the government's identification testimony would have been a waste of time. We disagree. The absence of a jury should make no difference since a defendant must be allowed a full and fair opportunity to test and explore incriminating testimony."
>
> Later, on the same page 25, the court stated:
>
> "....Even a judge who appears to have made up his mind on the basis of what he has heard, may be moved to reasonable doubt in the light of what may develop from full cross-examination on relevant matters."

In U.S. v. Cascade Linen Supply Corp. of New Jersey, 169 F. Supp. 565 (S.D.N.Y. 1958), the Court observed on Page 568:

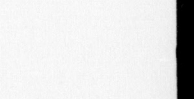
> "....The obligation to measure the evidence against the rule of reasonable doubt arises only when both sides have rested, and this is as true in a case tried to a jury as it is in one in which a jury is waived. This obligation cannot arise from a resting of Government's case alone and a motion for acquittal. In this posture, the moving defendants are entitled to invoke the Court's power to enter a judgment of acquittal as a matter of law, but not to impose the duty of rendering findings on the facts. The latter occurs only upon the final termination of the proof and is the final conclusion of the trier of the facts on the totality of the evidence. Short of the resting of both sides there can be no totality of evidence, no obligation to render findings, and necessarily, no occasion for applying the rule of reasonable doubt."

It is respectfully submitted that the Court's premature finding of guilt of the defendant Spirn "qualifies as plain error, that is, legal impropriety...prejudicially affecting the substantial rights of the defendant and sufficiently grevious to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result." State v. Hock, 54 N.J. 526, 528 (Supreme Court of New Jersey 1969, cert. den. 399 U.S. 930 (1969)).

## CONCLUSION

For the aforementioned reasons the defendant's conviction should be reversed.

Respectfully submitted,



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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Cr. 608 (HRT)

UNITED STATES OF AMERICA : (superseding 73 Cr. 990)

vs. ORDER FOR APPEAL AS INDIGENT

MITCHELL REIN and ZELIG SPIRN :

This matter having come on before me upon Motion for Appeal on behalf of Zelig Spirn, as an indigent, and the Court having considered the verified petition and all other papers herein and having heard argument of counsel and good cause appearing,

IT IS on this 7th day of August, 974

ORDERED:

(1) That Robert S. Persky, Esq., with offices at 40 Journal Square, Jersey City, New Jersey be and is hereby appointed as assigned counsel on behalf of the defendant Zelig Spirn to prosecute the appeal herein.

(2) That leave is hereby granted to appeal in forma pauperis and said appeal may be heard on the original papers in the Court below without printing same and upon typewritten copies of the points of appeal and that free transcripts be prepared and provided.

(3) That the filing of the appendix be dispensed on the ground that the said papers are unnecessary for the proper determination of this appeal.

(4) That the defendant Zelig Spirn be and is hereby granted a period of days to perfect the appeal proceedings herein.

JUDGE